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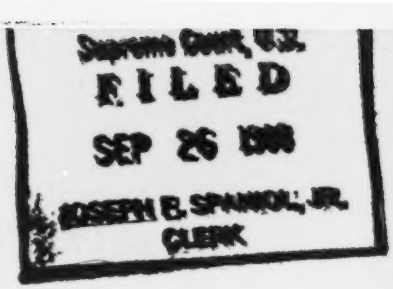

No. 88-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JAMES W. LEE,

Petitioner,

v.

EKLUTNA, INC., UNITED STATES OF AMERICA, SECRETARY OF THE INTERIOR, DIRECTOR, BUREAU OF LAND MANAGEMENT,

Respondents,

THERESE U. DONNELLY, Personal Representative of the Estate of Joseph F. Donnelly, Deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Is a citizen's occupancy of land as a primary place of residence the sole condition for reconveyance of land under Alaska Native Claims Settlement Act §14(c)(1), from land patented to a Native Village corporation under §14(a) of that Act?

PARTIES INVOLVED

In addition to the parties named in the caption, the Court of Appeals' Amended Opinion names Cook Inlet Region, Inc. in its caption. Cook Inlet did not participate in the proceedings before the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

James W. Lee respectfully petitions this Court to issue a writ of certiorari to review the judgment and amended opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding.

OPINIONS BELOW

The United States Court of Appeals issued an Amended Opinion on June 27, 1988. The opinion is reported at 841 F.2d 968, with an omission, and appears as Appendix A to the petition of Therese U. Donnelly from the same decision, filed in this Court on or about September 23, 1988. The district court's Opinion appears as Appendix C to the Donnelly petition, p. 32a. Lee respectfully refers the Court to the Donnelly Appendix.

JURISDICTION

This is a petition for review

of a final judgment of the United States Court of Appeals for the Ninth Circuit entered on June 27, 1988. An order denying a petition for rehearing was entered on June 27, 1988. The judgment and order appear as Appendices I, p. 94a, and J, p. 96a, to the Donnelly petition. Jurisdiction of this Court is invoked under Title 28, United States Code §1254(1).

STATUTES

This petition involves Federal Power Act, §24, 16 U.S.C. §818; Alaska Native Claims Settlement Act ("ANCSA") §§3(e), 14(c)(1) and 26, and 43 U.S.C. §1632. ANCSA §§3(e) and 14(c)(1), as amended, now appear as 43 U.S.C. §§1602(e) and 1613(c)(1). §26 appears at 85 Stat. 715 (Public Law 92-203, Dec. 18, 1971). As enacted in 1971, ANCSA §14(c)(1) provided

> Each patent issued pursuant to subsections (a) and (b) shall be

> subject to the requirements of this subsection. Upon receipt of a patent or patents: (1) the Village Corporation shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry;

The remaining statutes are set out in Appendix P to the Donnelly petition, to which Lee respectfully refers the Court.

STATEMENT

James W. Lee occupied as his residence a tract of land in Alaska which in 1979 was patented to Eklutna, Inc. under ANCSA §14(a). Eklutna is a Village corporation organized under ANCSA. In the district court Lee prayed for a surface conveyance from Eklutna under ANCSA §14(c)(1). The district court had jurisdiction under 28 U.S.C. §1331 since a federal question was involved. Congress intended judicial

review of a Village corporation's refusal of a §14(c) surface conveyance. 43 U.S.C. §1632(b).

Lee contends that §14(c)(1) rights do not depend on any other title or right of occupancy which Lee may have but, since the lower courts placed these matters in issue, Lee briefly reviews this background: In 1957 James W. Lee entered a 160 acre contiguous tract in the Eagle River Valley in Alaska hoping to obtain a homestead patent. The BLM afterwards told Lee that only part of his land was available for the homestead laws because part of it, the BLM said, was within a power site classification. Lee, via his wife Charlice, wrote to the Bureau of Land Management Director, the Federal Power Commission and, finally, the Secretary of the Interior about the alleged power withdrawal. Donnelly

App. N, p. 111a. The Secretary represented to the Lees that federal law forbade homesteading on the land. Donnelly App. O, p. 113a, despite the command of §24 of the Federal Power Act ("§24FPA")(Donnelly App. P, p. 115a) that the land be opened to homestead entry immediately following the Federal Power Commission's 1952 determination that the land be opened to homesteading. Donnelly App. M, p. 107a.

Lee eventually obtained patent, in the 1960s, to the part of the land which was not within the area the BLM said was withdrawn to protect future electrical power reservoirs.

The allegedly withdrawn land was lower in elevation than the remainder. However, the BLM did not adopt an official survey delineating the boundary of the alleged reserve until the mid-1960s.

At all times since 1958 Lee has lived on the unitary 160 acre tract, except for a period in the early 1960s when he was stationed in Korea on military duty. In late 1971 the BLM served on Lee a notice claiming that he was in violation of the Unlawful Inclosures Act and demanded that he move his improvements. He did move some of his improvements.

Lee's homestead law claim was part of an earlier appeal, Lee v. United States, 809 F.2d 1406 (9th Cir. 1987), cert. denied, 56 U.S.L.W. 3498 (1988). That earlier appeal did not, however, consider Lee's rights (1) to equitable relief other than under the Quiet Title Act of 1972, 28 U.S.C. §2409a ("QTA") or (2) Lee's right to a surface conveyance under ANCSA §14(c)(1). Lee's §14(c)(1) claim was the subject of a Rule 54(b) determination in the dis-

trict court which came on for a later appeal before the Ninth Circuit. The latter appeal was consolidated with the case of Donnelly v. United States. The Ninth Circuit's Amended Opinion, June 27, 1988, affirmed the district court's dismissal of their claims for §14(c)(1) reconveyances.

The Ninth Circuit stated that Lee's §14(c) claim had to be "based on" his homestead title claim against the United States under the QTA. Donnelly App. A, p. 16a. The Ninth Circuit also felt that allowing a §14(c) conveyance would violate §24FPA, a statute which on its face protects only "lands of the United States" -- and then only to the extent necessary to restrict disposition which might interefere with possible dams which might be licensed under the Federal Power Act. Donnelly App. A, p. 15a. §24 FPA did

not forbid occupancy; it merely reserved to the United States a right of re-entry. See §24FPA, Donnelly App. P, p. 115a.

Moreover, once the land was conveyed to Native corporations under ANCSA it was no longer "lands of the United States" and §24FPA by its terms ceased to operate. ANCSA §14(c)(1), however, operates on land after it has been conveyed to a Village corporation ("Upon receipt of a patent . . . the Village Corporation shall first convey . . .".).

When in 1971 Congress passed the Alaska Native Claims Settlement Act ("ANCSA"), it defined "public lands" as any federally-owned lands. ANCSA §3(e). Since this definition covers all Alaska lands not in private ownership, it is immaterial whether the land was previously in any federal land withdrawal. ANCSA granted lands

to Native corporations via §11(a) and §14(a) of ANCSA, which provide that land was to be selected under ANCSA from "public lands".

It is noted that ANCSA §3(e), §11(a) specify limited, named exclusions from federal lands which will not be "public lands" under ANCSA, such as National Park land and defense reserves, as either not being public land or not available for Native selection and conveyance.

Congress provided, however, that of the public lands that were available for Native conveyance and which were in fact so conveyed, the ANCSA patentees were obliged to take certain actions land was patented to them under ANCSA §14(a). Native corporations were required to ascertain the persons in physical occupancy of any of such lands. If such persons' occupancy was either

for residence or business purposes, ANCSA §14(c)(1) enjoins Native corporations to convey the surface estates of such lands to such occupants. ANCSA §14(c)(2)-(4) provided for similar conveyances to other entities for other specified purposes. Donnelly App. P, p. 123a-124a. Nowhere in §14(c) does any language suggest a requirement that the occupant possess any right of occupancy of the land, as against the United States, the Native village, or anyone else.

No other statute (or regulation for that matter) imposed any additional conditions on §14(c)(1) conveyances.

In contrast, ANCSA §§14(g) and 22 (Donnelly App. P., pp. 125a, 130a) provide for issuance of patents to persons who have independent claims to title under the federal public lands and mining statutes.

In 1980 Congress added 43 U.S.C. §1632(b) providing limitations period for review of Native corporations' decisions to convey or not convey such lands to surface occupants.

REASONS FOR GRANTING THE WRIT

Congress's Plain Language Fully Expresses Its Legislative Judgment That Occupants Must Be Issued Surface Conveyances of Alaska Land.

Eklutna, Inc., defendant in the district court, received a patent pursuant to ANCSA §14(a) in 1979. As directed by §14(a), the lands patented to Eklutna were the lands withdrawn under ANCSA §11(a) from "public lands". "Public lands" is specially defined in ANCSA §3(e):

> "Public lands" means all Federal lands and interests therein located in Alaska except: (1) the smallest practicable tract, as determined by the Secretary, enclosing land actually used in connection with the administration of any Federal installation, and (2) land selections of the State of Alaska which have been patented or tentatively approved under section 6(g) of the Alaska

> Statehood Act, as amended (72 Stat. 341, 77 Stat. 223), or identified for selection by the State prior to January 17, 1969;

This definition superseded all prior land withdrawals or classifications, so far as ANCSA was concerned. With exceptions specified in ANCSA, this definition causes all Native land selections under ANCSA to be made from any federally-owned lands in Alaska, without regard to their status, as withdrawn or not-withdrawn, reserved or not-reserved, or otherwise subject to any restriction or classification.

Were ANCSA otherwise drafted, the subject lands in this case could not have been conveyed to Eklutna, Inc., if they were in a valid land withdrawal. But they were so conveyed; the immediate consequence of this fact is that the withdrawal, if any, of these lands was permanently terminated once Eklutna selected these lands.

By virtue of the Native selection, they then ceased being "lands of the United States" and §24FPA by its terms was no longer in force. Nothing in United States v. Consolidated Mines and Smelting Co., 455 F.2d 432 (9th Cir. 1971) is to the contrary.

Congress did not and was not required to state in so many words that any prior alleged withdrawals were superseded. §26 of the Act (uncodified) provides:

> To the extent that there is a conflict between any provision of this Act and any other Federal laws applicable to Alaska, the provisions of this Act shall govern.

85 Stat. 715 (Pub. Law 92-203). Emphasis supplied.

Once such alleged prior withdrawals were superseded with respect to one provision of the Act, they were superseded as to all provisions. This is the obvious intent of a unitary enactment

containing a uniform definitions section (ANCSA §3(e): "For the purposes of this Act, the term . . . "Public lands" means . . .".). ANCSA simply does not direct that lands are "public lands" for one purpose (§11(a), §14(a)) under ANCSA but not for other purposes (§14(c)).

As noted above, ANCSA §3(e) made certain specific exclusions from "public lands". §11(a) (Donnelly App. P., p. 121a) specified also that lands in National Park System and lands withdrawn "for national defense purposes other than Naval Petroleum Reserve Numbered 4" should be excluded from the lands available to Natives. §22(b) provides that entries made in violation of one specified withdrawal (Public Land Order 4582) would not receive patents. §22(1) specified that certain municipal lands could not be selected.

ANCSA in blunt terms requires Native corporations to reconvey the surface estate to persons using the land for certain specified purposes.

The gist of this petition deals with the Court of Appeals' novel declaration, unfounded in statute, that notwithstanding §3(e) of ANCSA, the courts should transpose the limitations of the homestead laws to §14(c)(1) reconveyances.

The immediate and insuperable obstacle to this is the principle that the literal words of Congress are to prevail unless (1) there is a demonstrable ambiguity, or (2) there is a demonstrable conflict with the express purpose of the statute. Neither exists here. Congress's directions are clear and therefore conclusive. The decisions below are judicial relegislation in the guise of interpretation. The lower

courts had no authority to disregard §14(c)'s language.

This Court frequently has declared that federal courts lack power to rewrite statutes. Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp., 108 S.Ct. 1350, 1354 (1988) ("[U]nenacted approvals, beliefs, and desires are not laws.") This principle is particularly appropriate where Congress never voiced any belief in the Court of Appeals' view that §14(c) is subject to additional conditions. As stated in another case,

> But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice -- and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law. Where, as here, "the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history . . . '[there is no occasion] to examine the

> additional considerations of 'policy' . . .that may have influenced the lawmakers in their formulation of the statute.'" Aaron v. SEC, 446 U.S. 680, 695, 100 S.Ct. 1945, 1954, 64 L.Ed.2d 611 (1980) quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 n. 33, 96 S.Ct. 1375, 1391 n. 33, 47 L.Ed.2d 668 (1976).

Rodriguez v. United States, 107 S.Ct. 1391, 1393 (1987).

Congress specified elsewhere in the Act when, and under what conditions, pre-existing land withdrawals were to limit land transfers directed under the Act. See pp. 9, 14 above. The omission of a similar condition in §14(c) signifies that this omission was deliberate. INS v. Cardoza-Fonseca, 107 S.Ct. 1207, 1213 (1987). ANCSA was a thoroughly considered Act, done in consultation with Alaska Natives represented by counsel. United States v. Atlantic Richfield, 612 F.2d 1132, 1139 (9th Cir. 1980) cert. denied 449 U.S. 888 (1980).

Under the Court of Appeals' theory, if a village were entirely within a land withdrawal, no one, Native or non-Native would be entitled to a §14(c) conveyance. However, a village 50 miles away which was not in a withdrawal, would be required to execute conveyances to all occupants. However, no purpose of ANCSA is served by depriving occupants of title if the land was in a withdrawal except for those withdrawals which Congress expressly preserved in ANCSA. Congress appears to have been indifferent to such withdrawals except in those instances where it so specified.

The only practical argument given by the Court of Appeals is that §14(c)(1), if enforced, reduces the land retained by Native village corporations. ANCSA §14(c) conveyances do not detract from the ANCSA settlement but are <u>part of</u> ANCSA's express purpose

to protect occupants, Native and non-Native, on an equal basis. See ANCSA §14(c)(1); Statement of Joseph Fitzgerald, Hearing on S. 1830, Senate Committee on Interior Affairs, 91st Cong., 1st Sess. 121, 126 (1969). The Court of Appeals' conclusion that §14(c) conveyances detract from the purpose of ANCSA is pure speculation and is opposed to the literal terms of the statute.

Moreover, Congress is presumed to have believed that its own previous laws had been complied with, so it never expected this particular power withdrawal to have any effect. Under §24 FPA this land was, or ought to have been, fully open to homestead occupancy since 1952; certainly it was or ought to have been open to Lee's homestead entry which he initiated in 1957. There is no way of reading

§24FPA to obtain a different result.

Just as prior land withdrawals are irrelevant to §14(c) reconveyances, Congress did not require that a person be able to quiet his or her title to §14(c) land, as against the United States, to obtain an occupancy conveyance under that section. Congress specified elsewhere in the Act where pre-existing land rights of individuals constituted a requirement or a limitation on conveyances. §§14(g), 22(b). The omission of similar requirements from §14(c) was deliberate. INS v. Cardoza-Fonseca, supra. Obviously, if a person already had such title there would be no need for §14(c). The land would already be in the hands of one entitled to it (by reason of §§14(g) or 22(b) or prior federal law) and would never be conveyed to Native corporations in the first instance.

Congress never intended that the test for §14(c)(1) to be to quiet title against the United States. QTA is subject to severe jurisdictional limitations to protect certain governmental interests. Block v. North Dakota, 461 U.S. 273, 285 (1983). By enacting §14(c)(1) Congress intended a new, independent grant to arise as of the date of conveyance, on land in which the United States had no interest. Hence the protections of the federal purse were irrelevant. It is pure speculation that Congress intended to disqualify anyone because of the previous status of land, or any previous acts of the occupant.

The Supreme Court of Alaska adopted a common sense reading of ANCSA §14(c)(1) in Hakala v. Atxam, 753 P.2d 1144 (Alaska 1988). It found no conditions relating to preexisting titles or withdrawals.

There was no reason for the Ninth Circuit Court of Appeals to read such conditions into the statute.

The Court of Appeals said the illegality of the withdrawal "calls for speculation". Amended Opinion, Donnelly App. A, p. 16a. §24FPA does not call for speculation. §24 required the Secretary to open land to homesteaders immediately after the FPC determined that homestead entry would not injure the electric power value of the land. Lee was the first (and, incidentally, only homestead entryman on the land) in time and therefore first in right. Shepley v. Cowan, 91 U.S. 330, 337 (1875). If the BLM contended that other persons rights might be involved, it would have not have claimed that the law did not permit homesteading, Donnelly App. O, p. 113a. The proper procedure would have been to adjudicate

the competing rights of others. 5 U.S.C. §558, Shepley, supra.

This Court has never permitted a government agency to fail to properly process an application and then rely on its own failure to do so as a ground for denying relief. Rector v. Gibbon, 111 U.S. 277, 291 (1883), Knapp v. Alexander-Edgar Co., 237 U.S. 162, 167-169 (1915). Since the alleged withdrawal was clearly illegal in the first instance, the burden lay on those who oppose Lee's homestead title and occupancy to show that the BLM could properly have denied Lee's homestead claim in the first instance. A homestead entry once lawfully initiated, cannot be prejudiced by the government maladministration of the public land laws or by subsequent government restrictions on the land. Knapp v. Alexander-Edgar Co., 237 U.S. 162, 166-167 (1915).

Under §14(c)(1), however, Congress never intended either Eklutna or the courts to become involved with such questions. That is why it wrote the statute simply and clearly in the first instance. The omission of complicated conditions facilitates the operation of §14(c)(1).

Nevertheless, it is clear that Congress intended Native corporations to make all necessary determinations under §14(c)(1) and that these decisions would be subject to judicial review as to all questions of law. 43 U.S.C. §1632(b).

Significantly, §1632(b) is the second part of a larger statute, of which §1632(a) is the first part. The two subsections contemplate different periods of limitations, and both periods are independent of the Quiet Title Act's statute of limitations, 28 U.S.C.

§2409a(g). It follows immediately from these facts that Congress believed that §14(c) had nothing to do either with the Quiet Title Act or the Secretary's land title decisions under ANCSA. 43 U.S.C. §1632 appears in Donnelly App. P, p. 132a.

No public policy is served by construing §14(c) restrictively. The Natives of Alaska participated in the drafting of ANCSA. They were guided by independent counsel. United States v. Atlantic Richfield, supra, at 612 F.2d 1139. They understood that ANCSA §14(c)(1) would reduce the amount of land retained by Village corporations, but nevertheless believed that §14(c)(1) should be part of the Act. Statement of Joseph Fitzgerald, supra. The reasons for the acceptance of this legislation are clear. The grant of 40,000,000 acres (62,500 square miles) is a vast

expanse of land. Selections were to be made by each of 205 independent villages organized as village corporations under ANCSA. 43 U.S.C. §1610(b), 1613(a), (h). Alaska natives realized, even as is now realized by all residents of Alaska who have travelled outside cities, that nearly all occupants of Alaska land outside the cities live in small clustered settlements in or nearby the numerous villages. It was thus obvious to those who promoted this legislation -- the Natives themselves -- that §14(c)(1) would reduce the acreages retained by village corporations. But it was also understood that transferring surface titles into the hands of occupants was <u>one of the very purposes of the Act</u>. §14(c) reconveyances possess a status as high as the patents to Village corporations in the first in-

stance. In so legislating, Congress determined that all residents, Native or non-Native should be treated equally. Statement of Joseph Fitzgerald, supra. Moreover, because of the limited scope of such settlement, compared to the vast tracts of unoccupied land patented to village corporations, transferring such lands would not, by any stretch of the imagination, undermine the Act's settlement or deprive Alaska Natives of the benefits intended by the Act.

Conclusion

For the foregoing reasons James W. Lee asks this Court to grant a writ of certiorari to review a major question of federal law affecting thousands of persons using land in Alaska. ANCSA §14(c) is one of the key provisions of Congress's program which, if not here reviewed, will be permanently

defeated. This is not only a question vitally important to Alaska's citizens. It presents a broader question of public lands law: whether courts possess a license to impose unlimited conditions on federal land disposal statutes to further nonlegislative policies.

Dated this 26th day of September, 1988.

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